

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON

**FILED**

October 12, 1999

Cecil Crowson, Jr.  
Appellate Court Clerk

WADDELL GRAY,	)	
	)	SHELBY CIRCUIT
Plaintiff/Appellee	)	
	)	
v.	)	NO. 02S01-9808-CV-00081
	)	
UNITED PARCEL SERVICE, INC.	)	
OHIO d/b/a UNITED PARCEL	)	HON. KAY S. ROBILIO,
SERVICE and LIBERTY MUTUAL	)	JUDGE
FIRE INSURANCE COMPANY,	)	
	)	
Defendants/Appellants	)	

**For the Appellants:**

Richard D. Click  
Eugene Stone Forrester, Jr.  
Farris, Mathews, Branam & Hellen  
One Commerce Square, Suite 2000  
Memphis, TN 38103

**For the Appellee:**

Roscoe A. Feild  
239 Adams Avenue  
Memphis, TN 38103

**MEMORANDUM OPINION**

**Members of Panel:**

Justice Janice Holder  
Senior Judge John K. Byers  
Senior Judge F. Lloyd Tatum

## **OPINION**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. See *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

The trial court found that the plaintiff sustained compensable injuries in July 1996 and was entitled to vocational disability awards of 20 percent to the body as a whole and 10 percent to each arm.

The defendants present the following issue on appeal: "Did the trial court err in awarding the Plaintiff 20% impairment to the body as a whole and a 10% impairment to the right arm and 10% impairment to the left arm?"

We modify the case and fix the permanent vocational disability based on the total injuries to the body as a whole in accordance with Tenn. Code Ann. § 50-6-207(3)(C) at 30%.

## **BACKGROUND**

At the time of trial, the plaintiff was 53 years of age and had been employed by UPS as a feeder driver for the past 29 years. Prior to that, he worked at Owens Illinois, a corrugated box company. He attended college for three years and served in the U.S. Marine Corps for six years. Prior to the injury in this case, he was in good health and had no pain that prevented him from performing any activities.

As a feeder driver, the plaintiff was required to drive and deliver packages to various destinations. His job specifically involved coupling and uncoupling trailers. He explained that he would connect or disconnect trailers by using a dolly that weighed between 1500-1700 pounds. Mr. Carl McVay, the plaintiff's manager,

testified that the dolly is calibrated so that the lifting is almost automatic after you begin the process.

On July 8, 1996, the plaintiff drove a Volvo tractor-trailer to Nashville for UPS. He testified that while he was uncoupling the trailers he felt a pain in his neck that ran down into his arms, wrists, and hands. On the trip back to Memphis, his pain became worse and he had trouble gripping the steering wheel. The plaintiff also testified that the steering was difficult and the seat was uncomfortable on the Volvo tractor-trailer but that he never filled out a driver vehicle report about these problems. When he returned to Memphis, the plaintiff informed Mr. McVay about the pain in his neck, arms, and hands. Mr. McVay testified that the plaintiff has always been a good and honest worker.

The plaintiff was first sent by UPS to Dr. Debbie O'Cain, who saw him periodically over a two to three week period and sent him to physical therapy at HealthSouth. He testified that his pain was so bad and his blood pressure was so high that HealthSouth refused to treat him anymore. When he returned to Dr. O'Cain, she referred him to Dr. Arsen Haig Manugian, an orthopedic surgeon. Dr. Manugian eventually diagnosed the plaintiff with carpal tunnel syndrome and performed carpal tunnel release surgeries on both of his hands. The plaintiff testified that he did not know that he had carpal tunnel syndrome prior to Dr. Manugian's diagnosis.

In February 1997, shortly after the surgeries, the plaintiff returned to the same job at UPS with no restrictions or limitations, but he continued to have pain and swelling in his arms. The plaintiff testified that he attempted to call Dr. Manugian and Ms. Cindy Kidd, his case worker, on several occasions to schedule visits about his continued pain but that neither Dr. Manugian or Ms. Kidd would return his calls. After his lawyer intervened, the plaintiff had one last appointment with Dr. Manugian in February 1998. At that time, the plaintiff was sent for a second EMG, but he reported that he never received the results despite his repeated calls to Dr. Manugian's office.

Since returning to UPS in February 1997, the plaintiff has not missed any work for pain or discomfort and has not complained to Mr. McVay of any additional problems. He continues to work approximately 50 hours five days a week at a rate

of \$21.12 per hour. Prior to his injuries, he earned \$20.52 per hour. Although the plaintiff can do other jobs at UPS, he understood that he would have to take a pay cut. Mr. James Kent Hardy, a health and safety manager for UPS, testified that employees who change jobs due to temporary or permanent disability stay at the same rate of pay.

The plaintiff testified that he continues to have sharp pain, numbness, tingling, and swelling while driving for UPS and that he has difficulty in lifting and holding onto items. Further, he has not been able to use tools or fish because of trouble with his grip. Finally, the plaintiff stated his opinion that he is 60 percent impaired as a result of the injuries to his hands and neck.

### **MEDICAL EVIDENCE**

Dr. Arsen Haig Manugian, a board certified orthopedic surgeon, testified by deposition. Dr. Manugian first saw the plaintiff on August 20, 1996 for complaints of neck pain, bilateral shoulder and arm pain, and intermittent numbness in both hands. After the plaintiff returned several times with continuing complaints, Dr. Manugian sent him for a CT scan of the cervical spine and an EMG. Dr. Steven Landy, a neurologist, performed the plaintiff's EMG. Dr. Landy found an abnormal study consistent with C-5 and C-6 radiculopathy and evidence of bilateral carpal tunnel syndrome, worse on the right.

Thereafter, Dr. Manugian diagnosed the plaintiff with bilateral carpal tunnel syndrome and performed surgery on his right wrist in December 1996 and on his left wrist in January 1997. After therapy, he released the plaintiff to return to work without restrictions or limitations, except to drive with padded gloves, on February 20, 1997. Dr. Manugian believed that the plaintiff made an excellent recovery from the surgeries and expected no impairment.

In February 1998, the plaintiff returned to Dr. Manugian with complaints that he had increasing pain in his neck, shoulders, and arms and that he had weakness and numbness in his arms when he gripped the steering wheel for long periods. At this time, Dr. Manugian still felt that the plaintiff had no permanent impairment as a result of the carpal tunnel syndrome and surgeries. In contrast to the plaintiff's testimony, Dr. Manugian testified that the plaintiff never called in the year prior to his February 1998 visit to complain about continuing pain.

Dr. Manugian also diagnosed the plaintiff with cervical spondylosis and degenerative arthritis of the cervical spine. He opined that the plaintiff's arthritic condition was part of the aging process and not caused by his work. He stated that the job of driving a truck might aggravate the plaintiff's pain or make his symptoms worse. Dr. Manugian testified that the plaintiff sustained no anatomical impairment as a result of the arthritic condition.

Dr. Joseph C. Boals, a board certified orthopedic surgeon, testified by deposition after seeing the plaintiff one time for an independent medical evaluation. Dr. Boals diagnosed the plaintiff with residuals from bilateral carpal tunnel release surgeries. He opined that the plaintiff has a five percent anatomical impairment to each extremity. In addition, Dr. Boals diagnosed the plaintiff with severe preexisting cervical spondylosis with C5-C6 radiculopathy. He opined that the plaintiff has a 10 percent permanent partial impairment to the body as a whole based on the radiculopathy. Dr. Boals stated that the job of driving a truck could cause or aggravate the plaintiff's problems with his neck and hands.

### **ANALYSIS**

The defendants raise the issue of whether the trial court erred in awarding the plaintiff 20 percent impairment to the body as a whole and 10 percent impairment to each arm.

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

Our review of the expert testimony reveals the following. Dr. Manugian found that the plaintiff had no permanent impairment from his arthritic condition or carpal tunnel syndrome. However, Dr. Manugian did state that the job of driving a truck might aggravate the plaintiff's pain or make his symptoms worse. Dr. Boals found that he sustained a 10 percent impairment to the body as a whole as a result of his arthritic condition and a five percent impairment to each arm as a result of his carpal

tunnel syndrome. Dr. Boals also stated that the job of driving a truck could cause or aggravate the plaintiff's problems with his neck and hands.

The defendants argue that the opinion of Dr. Manugian, the treating physician, should be accorded greater weight than the opinion of Dr. Boals, who only saw the plaintiff one time for an independent medical evaluation. We note the trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

Regarding the lay testimony, the plaintiff testified that prior to the July 8, 1996 work injury to his neck, arms, and hands he had no pain or difficulty in performing his work. However, since being diagnosed with carpal tunnel syndrome and an arthritic condition and undergoing two surgeries, the plaintiff's pain has increased to the point of making it difficult for him to drive and grip the steering wheel in his job. In this case, as in all workers' compensation cases, the claimant's own assessment of her physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

In making determinations of vocational disability, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Our review of these relevant factors shows that the plaintiff is 53 years old, has some college education, and has worked as a truck driver for UPS for the past 29 years.

We find the evidence does not preponderate against the findings of the trial court that the plaintiff sustained a vocational disability of 20 percent to the body as a whole because of the neck injury and a vocational disability of 10 percent to each arm because of the carpal tunnel syndrome.

Regarding the plaintiff's arthritic condition, the defendants contend that his injury of July 8, 1996 does not constitute an "injury by accident" because it produced only an increase in pain.

In our view, the following rules of law settle this point: (1) an employer is responsible for workers' compensation benefits, even though the employee may have been suffering from a serious preexisting condition or disability, if the

employment causes an actual progression or aggravation of the prior disabling condition or disease which produces pain that is disabling, and (2) an employer takes an employee as he is and assumes the responsibility of him having a preexisting condition aggravated by a work related injury which might not affect a normal person. *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 488 (Tenn. 1997) (citations omitted).

In this case, the plaintiff suffered a work related injury on July 8, 1996 which caused an aggravation of his preexisting arthritic condition which produced disabling pain. Therefore, we find that the preponderance of the evidence supports the trial court's finding that the plaintiff suffered a compensable injury by accident.

Tenn. Code Ann. § 50-6-207(3)(C) limits the plaintiff's recovery to one total award. This section states in pertinent part: "When an employee sustains concurrent injuries resulting in concurrent disabilities, such employee shall receive compensation only for the injury which produced the longest period of disability. . . ."

In *Crump v. B & P Const. Co.*, 703 S.W.2d 140 (Tenn. 1986), the Supreme Court dealt with the concurrent injury rule established by Tenn. Code Ann. § 50-6-207(3)(C) and held that concurrent injuries to a plaintiff's arm, which led to a psychiatric disability, should be compensated on the basis of the injury to the body as a whole because the disabilities arose from one injury.

Tenn. Code Ann. § 50-6-207(3)(C) applies to this case because the injury to the plaintiff's neck is to the body as a whole and the injury to his arms should be to the body as a whole when superimposed on his neck injury.

The 10% disability to the arm and the 20% disability to the body as a whole, when combined as required by the statute, amount to 30% vocational disability to the body as a whole. We, therefore, fix this as the award in the case.

The cost of this appeal is taxed to the defendants.

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John K. Byers, Senior Judge

CONCUR:

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Janice Holder, Justice

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F. Lloyd Tatum, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

WADDELL GRAY,

Plaintiff/Appellee,

vs.

UNITED PARCEL SERVICE, INC.,  
OHIO d/b/a UNITED PARCEL SERVICE and  
LIBERTY MUTUAL FIRE INSURANCE  
COMPANY,

Defendants/Appellants.

) SHELBY CIRCUIT  
) NO. 90431-5 T.D.  
)  
) Hon. Kay S. Robilio,  
) Judge  
)  
)  
) NO. 02S01-9808-CV-00081  
)  
)  
) ~~MODIFIED AND AFFIRMED~~

**FILED**  
**October 12, 1999**  
**Cecil Crowson, Jr.**  
**Appellate Court Clerk**

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order

of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Defendants/Appellants, for which execution may issue if necessary.

IT IS SO ORDERED this 12th day of October, 1999.

PER CURIAM

